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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 SPLUNK INC.,) Case No. 3:20-cv-4377
13) Plaintiff,)
14 v.)) **COMPLAINT FOR DECLARATORY
15 DEUTSCHE TELEKOM AG,) JUDGMENT OF NON-INFRINGEMENT
16) Defendant.) TRIAL BY JURY DEMANDED**
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1 Plaintiff Splunk Inc. (“Splunk”) for its Complaint against Defendant Deutsche Telekom
 2 AG (“DT” or “Defendant”) alleges as follows:

3 **INTRODUCTION**

4 1. As one of San Francisco’s most successful homegrown software companies,
 5 Splunk develops enterprise software that allows businesses to bring data to every part of their
 6 business. Companies of all sizes recognize the value of Splunk’s products and, significantly,
 7 more than 90 of the Fortune 100 are Splunk customers.

8 2. DT is a German conglomerate that provides telecommunication services, a
 9 completely different field than enterprise-software development. Originating from a state-run
 10 monopoly, on information and belief, DT continues to hold a leading market position and enjoy
 11 strong consumer recognition in Germany. DT provides its telecommunications products and
 12 services worldwide, including in the United States through its subsidiary T-Mobile US, Inc.

13 3. DT has secured trademark rights worldwide to the color magenta, a specific shade
 14 of purplish-pink, in the field of telecommunications. Apparently not content with that
 15 exclusivity, DT has repeatedly attempted to block companies—even those, like Splunk, in
 16 completely different industries—from using any shade of magenta (or even straight pink) in
 17 connection with branding. For example, in 2008, DT sent a letter to an online technology blog,
 18 Engadget, demanding that it stop using magenta in one of its logos. After Engadget posted DT’s
 19 letter to its site, assuring Engadget readers that DT’s claim of potential consumer confusion was
 20 “[n]ot an early April Fool’s joke,”¹ DT, on information and belief, backed down. More recently,
 21 in 2019, DT threatened Lemonade, an online provider of homeowners and renters insurance that
 22 uses the color pink—not magenta—in its branding.² DT’s threats and subsequent litigation
 23 prompted Lemonade to petition to cancel DT’s pertinent trademark in the European Union,
 24 where it remains pending.

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 27 ¹ <https://www.engadget.com/2008-03-31-deutsche-telekom-t-mobile-demands-engadget-mobile-discontinue.html> (last visited June 26, 2020)

28 ² <https://techcrunch.com/2019/11/04/lemonade-gets-a-nastygram-from-deutsche-telekom-over-its-use-of-magenta-says-it-will-fight/> (last visited June 26, 2020)

1 4. After threatening Splunk with litigation since January, DT initiated trademark-
2 infringement proceedings in its home court in Germany and reserved rights to do so in the United
3 States. DT's aggression has forced Splunk to do something it has never done in its nearly 17
4 years of existence: file a federal case in the United States. Desiring business certainty, Splunk
5 seeks a declaration that its multicolor gradient branding does not infringe any pertinent DT
6 trademark.

PARTIES

8 5. Plaintiff Splunk is a corporation organized and existing under the laws of the
9 State of Delaware, having its principal place of business at 270 Brannan Street, San Francisco,
10 California 94107.

11 6. On information and belief, Defendant DT is a corporation organized and existing
12 under the laws of Germany, having its principal place of business at Friedrich-Ebert-Allee 140,
13 Bonn 53113, Germany.

JURISDICTION AND VENUE

15 7. This action includes a declaratory judgment action arising under the Declaratory
16 Judgment Act, 28 U.S.C. §§ 2201 and 2202. The Court has subject matter jurisdiction over this
17 action pursuant to 15 U.S.C. § 1121 (action arising under the Lanham Act); 28 U.S.C. § 1331
18 (federal question jurisdiction); and 28 U.S.C. § 1338(a) (any Act of Congress relating to
19 trademarks).

20 8. The Court has specific personal jurisdiction over Defendant because Defendant's
21 activities within this judicial district gave rise to the claims in this matter, in that it sent Splunk a
22 cease-and-desist letter in this judicial district threatening legal action. As explained further
23 below, Defendant is monitoring Splunk's trademark applications and has indicated to the United
24 States Patent & Trademark Office that it intends to file a notice of opposition against one of
25 Splunk's pending applications. Furthermore, Defendant obtained a preliminary injunction from
26 a German court *ex parte* that, if permitted to take effect, will require Splunk to take action in this
27 judicial district, including but not limited to modifying its website, marketing and promotional
28 materials, mobile apps, and social media accounts. Splunk has also had to take steps in this

1 District to issue a bank guarantee for €270,000 as a security deposit after a different chamber in
2 the German court granted Splunk’s request for a temporary stay of the preliminary injunction.
3 The Court also has personal jurisdiction over Defendant because, upon information and belief,
4 Defendant conducts substantial business in this judicial district, and Defendant offers products
5 and services under its asserted magenta trademark within this judicial district. In the alternative,
6 the Court has personal jurisdiction over Defendant pursuant to Fed. R. Civ. P. 4(k)(2) because,
7 upon information and belief, DT is not subject to jurisdiction in any state’s courts of general
8 jurisdiction, and is therefore subject to personal jurisdiction in any district because it has
9 registered trademarks with the United States Patent & Trademark Office and alleges that it is
10 using those marks in commerce within the United States.

11 9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2)
12 because Defendant sent Splunk a cease-and-desist letter in this judicial district threatening legal
13 action and because Defendant's activities are causing harm to Splunk in this district. Venue is
14 also proper in this judicial district pursuant to 28 U.S.C. 1391(c)(3) because Defendant is a
15 foreign corporation and thus, for purposes of venue, may be sued in any judicial district.

GENERAL ALLEGATIONS

I. SPLUNK'S BUSINESS

18 10. Founded in 2003, Splunk is a publicly traded corporation headquartered in San
19 Francisco. Splunk is a developer and provider of enterprise software solutions that enable
20 organizations to gain real-time operational intelligence by harnessing the value of their data
21 regardless of where it is coming from.

22 11. Splunk's innovative software products enable enterprises to investigate, monitor,
23 analyze, and act on machine data regardless of format or source. In contrast to traditional IT
24 systems that require users to establish the format of their data prior to collection in order to
25 answer a pre-set list of questions, Splunk's software allows users to run queries on data without
26 having to define or understand the structure of the data prior to collection and indexing.

1 12. Splunk's flagship product, Splunk Enterprise, is a machine data platform that
2 provides a range of capabilities for data collection, indexing, search, reporting, analysis, alerting,
3 monitoring, and management.

4 13. Splunk's customers leverage its offerings for various uses, including
5 infrastructure and operations management, security and compliance, software development and
6 IT operations, applications management, and business analytics. They are sophisticated
7 businesses and enterprises, government agencies, and educational institutions that select
8 Splunk's products after careful investigation, testing, and deliberation, followed by heavily
9 negotiated purchases.

10 14. Splunk's products have been hugely successful in the United States and around
11 the world. Its customers include, *inter alia*, Comcast, Coca-Cola, Nasdaq, and the U.S. Census
12 Bureau. As mentioned earlier, more than 90 members of the Fortune 100 currently use Splunk's
13 products.

14 15. Splunk generated revenue of approximately \$2.359 billion for fiscal year 2020,
15 and employs more than 6,000 people in more than 45 offices worldwide.

16 16. Splunk has received significant media attention for its revolutionary approach to
17 big data, including in articles in *The New York Times*, *The Wall Street Journal*, and *Forbes*.

18 **II. SPLUNK'S TRADEMARKS AND COLOR GRADIENT**

19 17. Splunk's products and promotional materials prominently feature its house marks,
20 SPLUNK and SPLUNK>, which it has been using since at least 2005, and for which it owns
21 several U.S. trademark registrations, including U.S. Registration No. 3,269,249 for SPLUNK
22 and U.S. Registration No. 4,374,897 for SPLUNK>.

23 18. On or around July 11, 2019, Splunk began using a color scheme in its promotional
24 materials featuring a gradient with transitions between coral, orange, and magenta that appear to
25 be arbitrary. Splunk specifically chose to include magenta and orange in its color gradient
26 because they are known to be particularly effective at capturing attention. By using a gradient
27 that includes these colors, Splunk's marketing and promotional materials stand out in an industry
28 dominated by blue, black, and gray.

19. Since at least as early as September 18, 2019, Splunk has also used this three-color gradient as a background for some of its logos, some of which include the SPLUNK> house mark.

20. Splunk has applied to register three trademarks that include its three-color gradient (collectively the “Splunk Gradient Marks”):

Coral, Orange, and Magenta Design, U.S. Serial No. 88/786,508.



Attached hereto as **Exhibit A** is a true and correct copy of a print-out of the Trademark Status & Document Retrieval (“TSDR”) page for U.S. Serial No. 88/786,508;



SPLUNK® & Design, U.S. Serial No. 88/786,496. Attached hereto as
Exhibit B is a true and correct copy of a print-out of the TSDR page for
U.S. Serial No. 88/786,496; and



D2E & Design, U.S. Serial No. 88/812,276. Attached hereto as **Exhibit C** is a true and correct copy of a print-out of the TSDR page for U.S. Serial No. 88/812,276.

21. Each of these applications has been approved for publication by the United States Patent & Trademark Office on the Principal register, and each application identifies the following goods in Class 9: “Downloadable computer software for collecting, analyzing, evaluating, monitoring, and transmitting data in the fields of compliance, network security, enterprise security, and maintenance; downloadable computer software for detecting fraudulent transactions and activities; downloadable computer software for investigating, remediating, and responding to fraud and to network and enterprise threat incidents; downloadable computer software for troubleshooting, diagnosing, and protecting computer software, hardware, networks, virtual machines, and operational technology; downloadable computer software for use in analyzing and monitoring computer networks; downloadable computer software for diagnosing industrial and business performance issues; downloadable computer software in the field of application analytics; downloadable computer software for providing operational intelligence, business analytics, security information, and troubleshooting based on data; downloadable data

1 mining software,” and the following services in Class 42: “Providing temporary use of non-
2 downloadable software and applications for collecting, analyzing, evaluating, monitoring, and
3 transmitting data in the fields of compliance, network security, enterprise security, and
4 maintenance; providing temporary use of non-downloadable software and applications for
5 detecting fraudulent transactions and activities; providing temporary use of non-downloadable
6 software and applications for investigating, remediating, and responding to fraud and to network
7 and enterprise threat incidents; providing temporary use of non-downloadable software and
8 applications for troubleshooting, diagnosing, and protecting computer software, hardware,
9 networks, virtual machines, and operational technology; providing temporary use of non-
10 downloadable software and applications for use in analyzing and monitoring computer networks;
11 providing temporary use of non-downloadable software and applications for diagnosing
12 industrial and business performance issues; providing temporary use of non-downloadable
13 software and applications in the field of application analytics; providing temporary use of non-
14 downloadable software and applications for providing operational intelligence, business
15 analytics, security information, and troubleshooting based on data; providing temporary use of
16 non-downloadable data mining software; consulting services in the field of information
17 technology; technical consulting services in the fields of datacenter architecture, public and
18 private cloud computing solutions, and evaluation and implementation of information technology
19 and services; technical support services, namely, remote and on-site infrastructure management
20 services for monitoring, administration and management of public and private cloud computing
21 and information technology systems.”

22 22. DT appears to be monitoring the status of Splunk’s trademark applications in the
23 United States. Indeed, for Spunk’s Coral, Orange, and Magenta Design, U.S. Serial No.
24 88/786,508, DT submitted a request to the United States Patent & Trademark Office for a 90-day
25 extension of time to file a notice of opposition against the mark, which the Patent & Trademark
26 Office granted on June 3, 2020. DT did not appear to submit similar requests with respect to
27 Splunk’s SPLUNK and D2E marks.

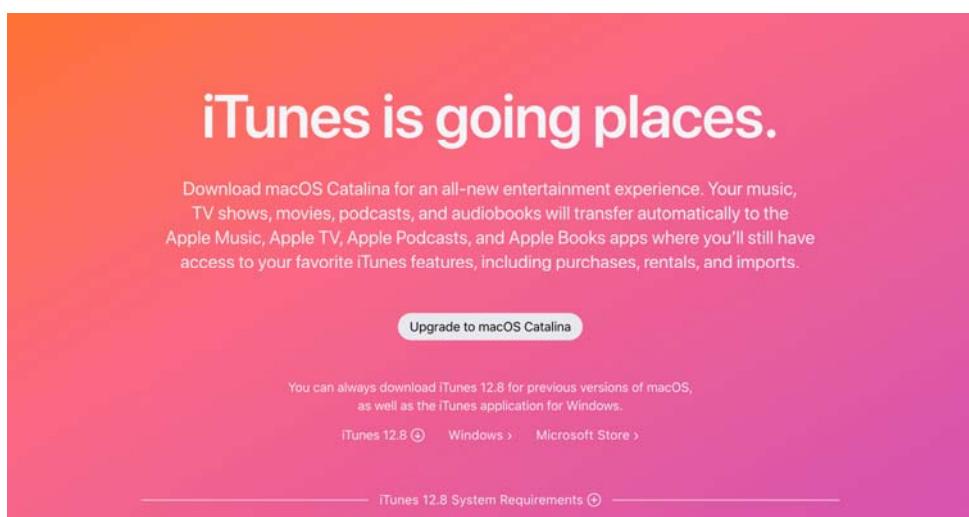
28

III. DEFENDANT DEUTSCHE TELEKOM AG HAS THREATENED NUMEROUS COMPANIES OUTSIDE ITS FIELD WITH TRADEMARK INFRINGEMENT EVEN THOUGH THE USE OF THE COLOR MAGENTA IS COMMON AND WIDESPREAD

23. From its German headquarters, DT operates several subsidiaries worldwide, including the mobile network operator T-Mobile US, Inc.

24. DT has repeatedly and aggressively asserted trademark rights in the color magenta and attempted to block companies—even those in completely different industries—from using any shade of magenta or pink in connection with branding. In addition to the Engadget and Lemonade examples discussed earlier, in 2015, DT threatened a smartwatch company called OXY, forcing OXY to change all of its branding to yellow and black after the small company lacked the financial resources to challenge DT’s claims.³ As yet another example, in 2018, DT sent threats to a small British company called DataJAR, which at the time employed a total of seven employees that wrote software to manage Apple iPhone and Mac devices.⁴ Numerous other examples exist.

25. Despite its efforts to do so, DT cannot keep up with the common and widespread use of magenta by companies outside the field of telecommunications. For example, tech-giant Apple has recently started to advertise iTunes using a color gradient very similar to the coral, orange, and magenta gradient used by the Splunk Gradient Marks:⁵



³ <https://www.theverge.com/2015/11/19/9761070/t-mobile-magenta-trademark-oxy-smartwatch> (last visited June 26, 2020)

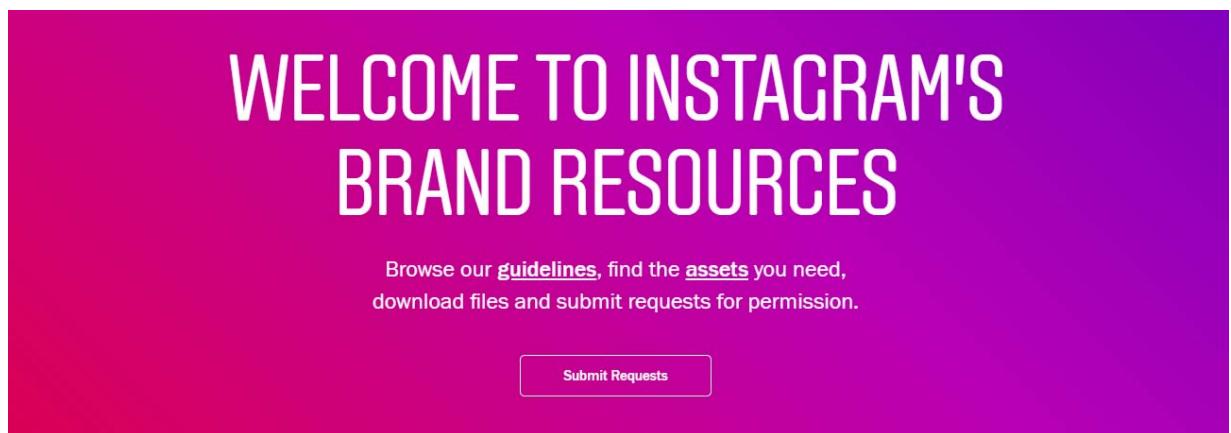
⁴ <https://www.bbc.com/news/uk-england-sussex-44107621> (last visited June 26, 2020)

⁵ <https://www.apple.com/itunes/> (last visited June 26, 2020)

1 As another example, Amazon prominently uses magenta to advertise its music streaming
 2 service:⁶



13 As yet another example, Instagram uses a color gradient featuring magenta in its logo and
 14 branding:⁷



22 The logos of the software products In Design⁸ and XD Vector⁹ offered by Adobe Systems also
 23 feature magenta, and so do the logos of Samsung's Galaxy Store¹⁰ and the popular JusTalk video
 24 calling app:¹¹

26 ⁶ https://www.instagram.com/p/B_Kxct3jr52 (last visited June 26, 2020)

27 ⁷ <https://en.instagram-brand.com> (last visited June 26, 2020)

28 ⁸ <https://www.adobe.com/products/inDesign.html> (last visited June 26, 2020)

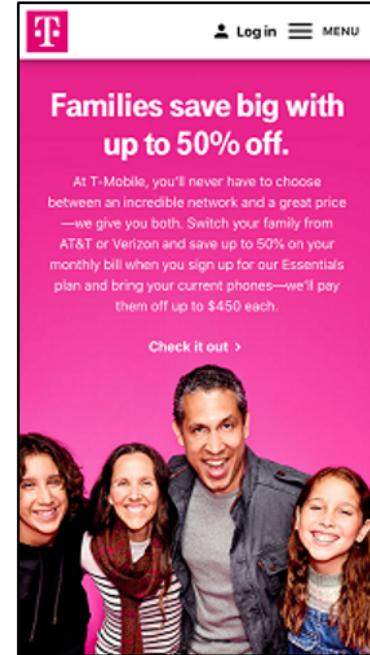
⁹ <https://www.adobe.com/products/xd.html> (last visited June 26, 2020)

¹⁰ <https://www.samsung.com/global/galaxy/apps/galaxy-store> (last visited June 26, 2020)

¹¹ <https://justalk.com/> (last visited June 26, 2020)



These are just a few of the companies using magenta outside the field of telecommunications. As these examples show, no company—except DT—believes that magenta is completely off limits. These logos, and not to mention the Splunk Gradient Marks, are readily distinguishable from DT's branding:¹²



B. Defendant's Cease & Desist Letter to Splunk

26. No company is safe from DT's self-proclaimed monopoly on the use of magenta in corporate branding. On February 12, 2020, DT sent a letter to Splunk's San Francisco and Munich offices, claiming that Splunk's use of the color magenta was unlawful. Attached hereto as **Exhibit D** is a true and correct copy of DT's February 12, 2020, letter to Splunk.

27. In its letter, DT alleges that it uses the color magenta in all company communications and in all advertising materials in Germany, elsewhere in the EU, and

28. ¹² <https://www.t-systems.com/de/en> (last visited June 26, 2020); <https://www.t-mobile.com/offers/big-savings-when-you-switch> (last visited June 26, 2020)

1 worldwide. It alleges that through its intense use of the color, magenta “has become a unique
 2 and well-known identifier for the goods and services of DT.” *Id.* ¶ 1.

3 28. DT also alleges that its subsidiary, T-Systems, uses magenta as intensively as DT
 4 and offers IT and telecommunication services. *Id.* ¶ 3.

5 29. DT alleges that it owns various trademark registrations worldwide to protect its
 6 trademark for the color magenta. DT specifically identifies an EU registration and two German
 7 registrations. *Id.* ¶ 4.

8 30. DT also alleges that it owns trademark registrations in the United States that
 9 incorporate magenta.

10 31. DT is identified as the owner of U.S. Registration No. 5,706,644 for “the color
 11 magenta applied as a background carrier for advertisements for telecommunication and
 12 information technology services, personal communications services, electronic mail services,
 13 electronic transmission and broadcasting services, and wireless Internet access services.” The
 14 registration identifies the following services in Class 38: “Telecommunications and information
 15 technology services, namely, wireless transmission of voice, data, images, audio, video, and
 16 information; telecommunications services, namely, personal communication services; electronic
 17 transmission of mail and messages; providing multiple-user access to a global computer
 18 information network; transmission of audio and video by telecommunications networks, wireless
 19 communication networks, the Internet, and satellite; broadcasting of radio and television
 20 programs; providing wireless Internet access.” Attached hereto as **Exhibit E** is a true and correct
 21 copy of a print-out of the TSDR page for U.S. Registration No. 5,706,644.

22 32. DT is identified as the owner of U.S. Registration No. 5,674,478 for “the color
 23 magenta as applied to the surface of product packaging for prepaid smart cards, mobile phones,
 24 tablet computers, mobile hotspot devices, wireless communication devices, battery chargers,
 25 cases for mobile phones and table computers, head phones, and accessories for the foregoing.”
 26 The registration identifies the following goods in Class 9: “Telecommunications and information
 27 technology equipment, namely, mobile phones, tablet computers, mobile hotspot devices,
 28 wireless communication devices for voice, data or image transmission, battery chargers, cases

1 for mobile phones and tablet computers, headphones, and accessories therefore, namely, mobile
 2 telephone belt clips, headphone replacement ear pieces, screen protectors comprised of plastic or
 3 glass adapted for use with portable electronic devices, stands for mobile phones; prepaid smart
 4 cards for mobile telephones and internet access.” Attached hereto as **Exhibit F** is a true and
 5 correct copy of a print-out of the TSDR page for U.S. Registration No. 5,674,478.

6 33. DT is identified as the owner of U.S. Registration No. 5,601,454 for “the color
 7 magenta as applied to the splash screen of mobile computer applications.” The registration
 8 identifies the following goods in Class 9: “Mobile applications for wireless data communication
 9 and managing user account settings.” Attached hereto as **Exhibit G** is a true and correct copy of
 10 a print-out of the TSDR page for U.S. Registration No. 5,601,454.

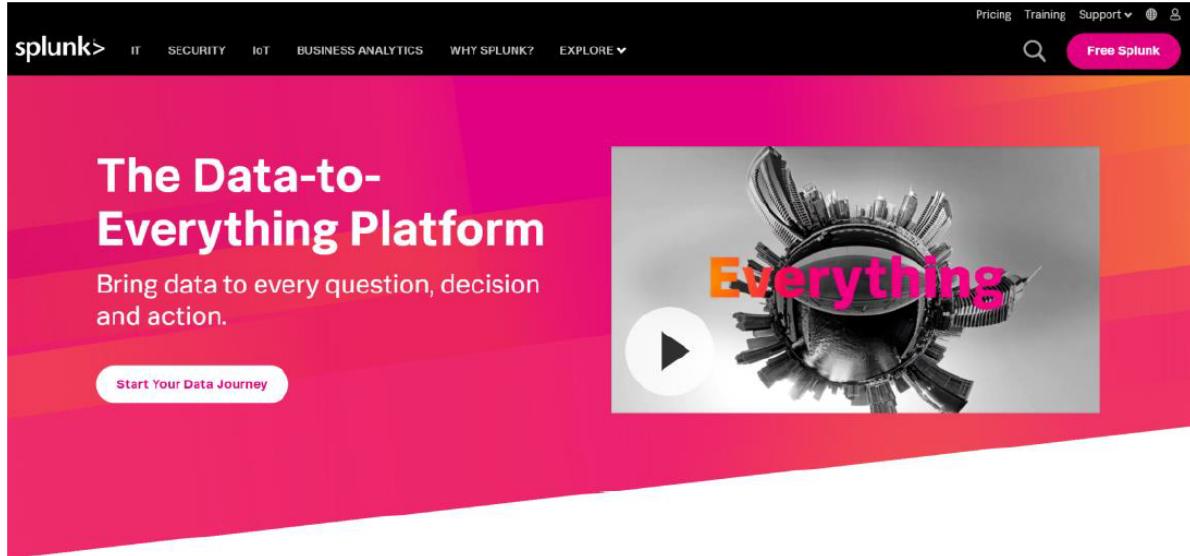
11 34. DT is identified as the owner of U.S. Registration No. 3,263,625 on the
 12 Supplemental Register for “the color magenta alone, which is the approximate equivalent of
 13 Pantone Matching System, Rhodamine Red U, used on the background of product displays and
 14 advertisements found in a store.” The registration identifies the following services in Class 38:
 15 “Telecommunication and information technology services, namely, wireless transmission of
 16 voice and data; providing multi-user access to a global communications network; two-way
 17 wireless transmission of electronic mail, text and images between mobile telecommunications
 18 terminals and computers; voice mail and messaging services; wireless broadcasting of textual
 19 content to mobile telecommunications terminals and computers; providing customized audio
 20 playback of musical, spoken word and other auditory content over a telecommunications
 21 network.” Attached hereto as **Exhibit H** is a true and correct copy of a print-out of the TSDR
 22 page for U.S. Registration No. 3,263,625.

23 35. DT’s letter alleges that Splunk’s use of magenta on its website, app, social media
 24 profiles, and in its advertising infringes DT’s magenta color marks, and reserves its right to take
 25 legal action against the use of the color magenta by Splunk “according to unfair competition law
 26 as well as based on US trademark law.” Ex. D ¶¶ 6 and 13.

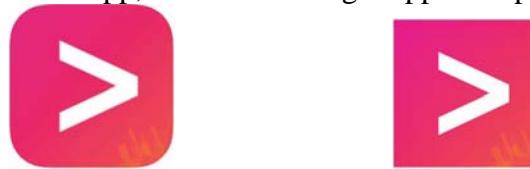
27 36. DT’s letter specifically reproduces images of Splunk’s website available at
 28 www.splunk.com, mobile app icons, social media logos and content, a Splunk brochure, and

1 Splunk's U.S. and foreign advertising materials as examples of Splunk's allegedly infringing use
 2 of the color magenta through Splunk's three-color gradient:

3 Splunk's Website at www.splunk.com



13 Icons used for Splunk Mobile app, available through Apple's App Store, and Google Play



14 Splunk Social Media Content on Facebook, Twitter, Instagram, YouTube & LinkedIn



1 U.S., German, and Canadian Marketing and Promotional Materials
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14 37. DT alleges that "Splunk and [DT] both provide services in connection with the
15 collecting and delivering of data (database services). Therefore, consumers will be misled that
16 there is an organizational or economic connection between Splunk and [DT]." *Id.* ¶ 6.

17 38. DT threatens that it is "fully prepared to take all legal measures necessary before
18 the competent courts in order to defend its valuable Magenta trademarks." *Id.* ¶ 10. It also
19 alleges that in addition to claims for an injunction, it would have claims for damages. *Id.*

20 **C. Defendant's Legal Actions in Germany**

21 39. On March 19, 2020, DT informed Splunk that it had filed for an EU-wide
22 preliminary injunction against Splunk's use of the color magenta, and that the Civil Chamber of
23 the Regional Court of Hamburg, which oversees general civil matters, had granted the injunction.

24 40. Because Splunk is headquartered in San Francisco, the injunction will require
25 Splunk to take action in this judicial district to modify its products, its website, and its marketing
26 and promotional materials. The injunction will also require Splunk to take action in this judicial
27 district with respect to the Splunk Mobile app available through the Apple App Store and Google
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1 Play and its social media logos and content on Facebook, Twitter, Instagram, YouTube &
 2 LinkedIn.

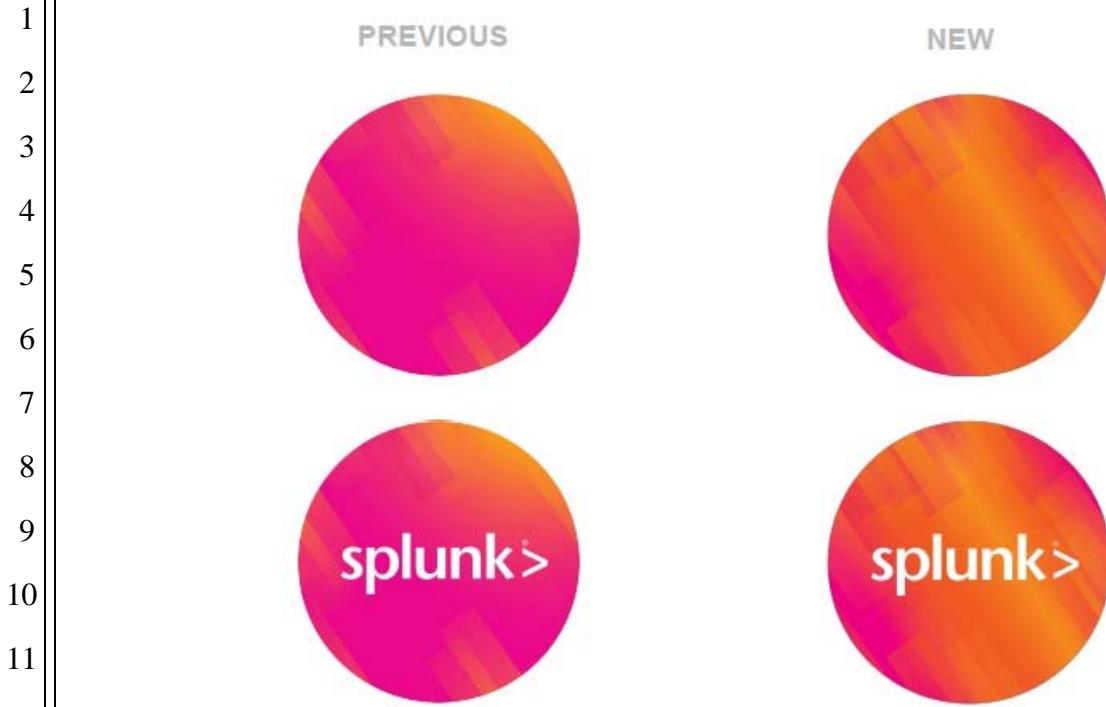
3 41. On March 25, 2020, Splunk sought review of the preliminary injunction order
 4 from the Chamber for Commercial Disputes at the Regional Court of Hamburg, which
 5 specializes in hearing commercial disputes including trademark matters. Splunk also requested a
 6 temporary stay of the preliminary injunction during the pendency of the review, which the court
 7 granted on April 17, 2020, conditioned on Splunk securing a bank guarantee for €270,000
 8 (around \$293,000 USD) as a security deposit.

9 42. The Chamber for Commercial Disputes held a hearing on June 9, 2020, and
 10 indicated it would issue a decision on the merits of DT's claims on or before July 7, 2020. The
 11 court declined to lift the stay of the preliminary injunction.

12 **D. The Parties' Attempts to Resolve This Matter Informally Failed**

13 43. For months, the parties engaged in confidential discussions to resolve this matter
 14 informally but could not reach an agreement. Splunk will not discuss the content of those
 15 discussions here. But Splunk proposed reducing the amount of magenta in the Splunk Gradient
 16 Marks while preserving the character and integrity of its branding approach. Splunk proactively
 17 did this not because it believes it is legally required to, but because Splunk prefers to avoid
 18 litigation except as a final resort (as, regrettably, is the case here). Splunk will not agree,
 19 however, to completely eliminate magenta from the Splunk Gradient Marks, as that would harm
 20 its brand and condone DT's improper threats and overreach. The updated Splunk Gradient
 21 Marks, representative samples of which are shown below, cannot and do not infringe any
 22 pertinent DT mark. Unfortunately, DT has refused to provide Splunk assurances that even the
 23 updated Splunk Gradient Marks do not infringe.

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13 **IV. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN**
14 **DEFENDANT'S ASSERTED MAGENTA MARKS AND THE SPLUNK**
15 **GRADIENT MARKS**

16 44. Splunk disputes that its use of the original and updated Splunk Gradient Marks
17 will cause any likelihood of confusion.

18 45. The Splunk Gradient Marks (hereinafter referring to both the original and updated
19 Splunk Gradient Marks) do not feature the uninterrupted use of magenta as DT's asserted mark.
20 Instead, the Splunk Gradient Marks feature a gradient that transitions between three colors
21 (orange, magenta, and coral) in a fashion that appears to be arbitrary. Further, because the
22 Splunk Gradient Marks are always used in conjunction with, or in close proximity to, its
23 SPLUNK and SPLUNK> house marks, consumers will rely on those house marks, not the color
24 gradient, to identify the source of Splunk's goods and services. Thus, the asserted magenta mark
25 is not at all similar to the Splunk Gradient Marks as they are encountered in the marketplace.

26 46. Moreover, the goods and services offered under the Splunk Gradient Marks are
27 not competitive with or related to the goods and services DT offers in the United States under its
28 asserted magenta mark. Splunk's software solutions are for data analysis. Indeed, its
 applications to register the Splunk Gradient Marks identify goods such as "[d]ownloadable

1 computer software for collecting, analyzing, evaluating, monitoring, and transmitting data in the
 2 fields of compliance, network security, enterprise security, and maintenance,” in Class 9 and
 3 similar downloadable software services in Class 42. Splunk does not offer telecommunications
 4 services, nor did it include any telecommunications services in its applications to register the
 5 Splunk Gradient Marks.

6 47. In contrast, DT provides telecommunications services and mobile
 7 telecommunications equipment, such as mobile phones and tablets, but no goods or services for
 8 data analysis. DT’s Registration No. 5,706,644 for the color magenta identifies services such as
 9 “telecommunications services, namely, personal communication services.” DT’s Registration
 10 No. 5,674,478 identifies goods such as “mobile phones, tablet computers, mobile hotspot
 11 devices, [and] wireless communication devices.” DT’s Registration No. 5,601,454 identifies
 12 goods such as “[m]obile applications for wireless data communication.” DT’s Registration No.
 13 3,263,625 identifies services such as “wireless transmission of voice and data.” These goods and
 14 services are not similar, nor closely related, to Splunk’s complex data analysis software.

15 48. DT alleges that Splunk and DT’s goods and services are related because “Splunk
 16 and [DT] both provide services in connection with the collecting and delivering of data (database
 17 services).” (Ex. D ¶ 6.) This broad description is not sufficient to establish that the goods and
 18 services offered by DT and Splunk are related because all software (regardless of purpose)
 19 collects data of some type—whether from user input, a local hard drive, remote servers, etc., and
 20 delivers data, whether to an output device such as a monitor, or a hard drive or server. Software
 21 is not related to telecommunications services merely because software collects and uses data
 22 while telecommunications services transmit data. Were that not the case, any distinction
 23 between software and telecommunications would collapse, thereby eviscerating the public-notice
 24 function of trademark use descriptions and different trademark classes.

25 49. Furthermore, there is no overlap in consumers in the pertinent fields or channels
 26 of trade used by the parties to market their products and services. Splunk’s goods and services
 27 offered under the Splunk Gradient Marks are directed to highly sophisticated business consumers
 28 who require advanced tools for analysis of big data. They are not commodity goods or services.

1 Purchasing decisions often take weeks or months and involve multiple conversations and, on
 2 many occasions, meetings—resulting in negotiated prices and customized software designed to
 3 meet each customers' specific needs. Splunk does not market its goods or services to individual
 4 consumers, or in the channels of trade that are used to market telecommunications services and
 5 mobile devices.

6 50. In contrast, DT's telecommunications services and mobile devices are commodity
 7 goods and services promoted primarily to individuals seeking mobile telephony and internet
 8 services. They are primarily offered in retail locations that an individual who needs to replace a
 9 broken or lost mobile device or who wants to change his or her mobile service provider visits in
 10 person, or orders online. To the extent DT offers telecommunications services to businesses, it
 11 occurs in an entirely different context and channel of trade than sales of Splunk's software for
 12 data analysis because such services are related to business connectivity needs, not data analysis
 13 needs.

14 51. DT alleges that Splunk is trying to associate itself with DT so that consumers are
 15 led to believe that Splunk is endorsed by or affiliated with DT. That is false. As the vast
 16 majority of the Fortune 100 would attest, Splunk has its own successful product suite and brand
 17 and has absolutely no reason to attempt to associate itself with DT. As discussed above, Splunk
 18 specifically chose to include magenta and orange in its color gradient because those colors are
 19 effective at capturing attention, and magenta is one of the four primary colors used in digital
 20 printing. Contrary to DT's belief, it does not have an unfettered monopoly on the use of magenta
 21 in any corporate branding, particularly in view of the functional benefit the bright color alone or
 22 in combination has at capturing attention.

23 **V. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN**
 24 **DEFENDANT'S ASSERTED MAGENTA MARK AND SPLUNK'S**
 25 **DECORATIVE USE OF ITS THREE-COLOR GRADIENT**

26 52. Splunk further disputes that decorative uses of a gradient that transitions between
 27 coral, orange, and magenta on its website and in written and online materials is source-
 28 identifying or likely to cause confusion.

1 53. Significantly, Splunk's website and written materials are all branded with its
2 house marks, SPLUNK and SPLUNK>, on which consumers will rely to identify the source of
3 Splunk's goods and services. This alone will serve to distinguish the source of the parties' goods
4 and services.

5 54. Further, as noted above, Splunk's goods and services are not competitive with or
6 even related to the goods and services DT offers under its claimed magenta mark. There also is
7 no overlap in the consumers or channels of trade used by the parties. Defendant sells commodity
8 telecommunications services and mobile devices, while Splunk offers sophisticated data
9 collection and analysis software to businesses. Most consumers of DT's goods and services are
10 not likely even to see Splunk's website or written materials, and those who do will be
11 sophisticated business consumers who will not mistakenly believe that Splunk's goods and
12 services originate from or are affiliated with DT.

13 55. Despite the large scale and reach of Splunk's business and substantial use of a
14 three-color gradient on its website and in written materials since mid-2019, Splunk is not aware
15 of any instances of actual confusion. DT has identified none.

FIRST CLAIM FOR RELIEF

Declaratory Judgment of Non-Infringement

18 56. Splunk incorporates by reference the allegations set forth in paragraphs 1-55, as if
19 fully set forth herein.

20 57. DT has alleged infringement under U.S. trademark law based upon rights that it
21 claims in the color magenta.

22 58. DT has alleged that the color magenta has become a unique and well-known
23 identifier for its goods and services because of its intensive use of the color in all
24 communications and advertising materials worldwide.

59. DT owns U.S. Registration No. 5,706,644 for “the color magenta applied as a
background carrier for advertisements for telecommunication and information technology
services, personal communications services, electronic mail services, electronic transmission and
broadcasting services, and wireless Internet access services.” The registration identifies certain

1 telecommunications services in Class 38. DT also owns U.S. Registration No. 5,674,478 for “the
2 color magenta as applied to the surface of product packaging for prepaid smart cards, mobile
3 phones, tablet computers, mobile hotspot devices, wireless communication devices, battery
4 chargers, cases for mobile phones and table computers, head phones, and accessories for the
5 foregoing.” The registration identifies certain telecommunications equipment in Class 9. DT
6 also owns U.S. Registration No. 5,601,454 for “the color magenta as applied to the splash screen
7 of mobile computer applications.” The registration identifies mobile applications for
8 telecommunications in Class 9. DT also owns U.S. Registration No. 3,263,625 for “the color
9 magenta alone . . . used on the background of product displays and advertisements found in a
10 store.” The registration identifies certain telecommunications services in Class 38.

11 60. DT has threatened to seek injunctive relief and damages for trademark
12 infringement, including under U.S. trademark law, arising from Splunk’s use of the color
13 magenta as part of the decorative three-color gradient that Splunk has been using on its website,
14 social media, and in written materials, as well as Splunk’s use of the Splunk Gradient Marks.

15 61. DT’s allegations of U.S. trademark infringement have caused, and will continue
16 to cause, damage to Splunk.

17 62. There is an actual case or controversy concerning Splunk’s right to use its three-
18 color gradient on its product and in its marketing and promotional materials, and as an element
19 of the Splunk Gradient Marks, such that the Court has jurisdiction over Splunk’s request for
20 declaratory relief.

21 63. There is no likelihood of confusion between Splunk’s use of its three-color
22 gradient, or of the Splunk Gradient Marks, in connection with its software goods and services
23 and DT’s use of magenta in connection with telecommunications services and mobile devices.

24 64. Splunk requests relief from the uncertainty and controversy that DT’s threats of
25 legal action have created, and that the Court declare that Splunk’s use of its three-color gradient
26 and of the Splunk Gradient Marks does not infringe any trademark rights that DT may have in
27 the color magenta.

28

PRAAYER FOR RELIEF

WHEREFORE, Splunk prays for the following relief:

65. That judgment be entered in favor of Splunk and against Defendant on each and every Count of this Complaint;

66. That this Court deny Defendant relief of any kind based upon its claim to rights in the magenta color;

67. That Splunk be awarded its costs incurred, including reasonable attorneys' fees;

and

That the Court grant such other and further relief as it deems just and proper.

Date: June 30, 2020

Respectfully submitted,
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